

FILED

NOT FOR PUBLICATION

FEB 22 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

GUST MARION JANIS,

Plaintiff - Appellant,

v.

ALBERTO R. GONZALES, Attorney
General, in his capacity as Attorney
General of the United States; et al.,

Defendants - Appellees.

No. 04-56315

D.C. No. CV-01-06685-RGK

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Federal prisoner Gust Marion Janis appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various constitutional,

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

statutory, and common law claims related to the conditions of his confinement. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's factual determination that Janis failed to exhaust his administrative remedies for clear error, and its legal conclusions de novo. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003). We review de novo dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *Rivera v. United States*, 924 F.2d 948, 950 (9th Cir. 1991). We affirm.

The district court did not err in determining that Janis failed to exhaust available administrative remedies prior to filing this action. *See* 42 U.S.C. § 1997e(a); *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (per curiam) (“a prisoner does not comply with [the exhaustion] requirement by exhausting available remedies during the course of the litigation”). We are not persuaded by Janis's contention that he was not required to exhaust available administrative remedies.

The district court properly dismissed with prejudice Janis's constitutional tort claims for damages against the United States based on sovereign immunity. *See Balser v. Dep't of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003). The district court also properly dismissed with prejudice Janis's claim under the Equal Access to Justice Act. *See Merrell v. Block*, 809 F.2d 639, 642

(9th Cir. 1987) (“Congress intended that an attorney have been retained for a prevailing pro se litigant to recover attorneys fees under the EAJA”).

AFFIRMED